Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HARVEY TAYLOR,

Petitioner,

v.

THOMAS McCUNE SLICK, Individually And As Executor Of The Estate of DOROTHY M. BALLANTINE, Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rescheduling of a Sheriff's Sale of a Debtor's real property by an executing creditor, during the pendency of the Debtor's Chapter 11 Case, prior to relief from the automatic stay being granted by the Bankruptcy Court and without any notice of the rescheduled sale date being provided to the Debtor other than an oral announcement at the originally scheduled, stayed Sheriff's Sale, violated the automatic stay provisions of **11 U.S.C. Section 362** and the Debtor's right to due process under the Fourteenth Amendment to the United States Constitution thus rendering the rescheduled Sheriff's Sale null and void

PARTIES TO THE PROCEEDING

Petitioner

Harvey Taylor, who is an individual, not a corporation or other entity, and thus has no parent companies or nonwholly owned subsidiaries.

Respondent

Thomas McCune Slick, who is an individual, not a corporation or other entity, and thus has no parent companies or nonwholly owned subsidiaries

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Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit was entered on June 2, 1999 and is reported at **178 F.3d 698 (3d Cir. 1999)**. The Opinion of the District Court for the Western District of Pennsylvania was an unreported Memorandum Opinion entered on May 5, 1998. The Opinion of the United States Bankruptcy Court for the Western District of Pennsylvania was entered on May 1, 1997 and is reported at **207 B.R. 995 (Bankr. Ct. W.D. Pa. 1997)**.

All of the foregoing opinions are attached hereto in the Appendix. (See A1-A10, A11-18 and A19-A49 respectively)

Statement Of Jurisdiction

The proceedings involved herein were originally commenced in the United States Bankruptcy Court for the Western District of Pennsylvania which had jurisdiction over the matter pursuant to an Order of Reference from the

District Court issued under **28 U.S.C. Section 157(a)**. In addition to the fact that this matter was commenced in a Title 11 Case, resolution of said case involved a federal question as to the scope of **11 U.S.C. Section 362** and the automatic stay afforded thereby.

The United States District Court for the Western District of Pennsylvania had appellate jurisdiction over the decision of the Bankruptcy Court pursuant to **28 U.S.C. Section 158(a)(1)**.

The United States Court of Appeals for the Third Circuit had appellate jurisdiction over the decision of the District Court pursuant to **28 U.S.C. Section 158(d)**. The Third Circuit Court of Appeals also had jurisdiction pursuant to **28 U.S.C. Section 1291** in that the Order of the District Court being appealed from was a final order.

This Honorable Court has jurisdiction over this matter pursuant to **28 U.S.C. Section 1254(1)**.

Constitutional And Statutory Provisions Involved

The text of the provisions involved herein are set forth in the Appendix hereto at A50-52. The provisions involved are the Fourteenth Amendment to the United States Constitution and **11 U.S.C. Section 362**.

Statement Of The Case

a. Factual Background

The instant matter arises out of a dispute regarding the ownership of real property. On December 16, 1991, the Petitioner and his spouse purchased a tract of land ("the property") from Martha J. Ballentine. The purchase price was to be paid over time pursuant to a note secured by a mortgage on the property. Payments, however, had become sporadic and in 1989, the Respondent herein, who had become the obligee in regard to the note and the mortgage on the property, commenced an action in mortgage foreclosure in State Court. The Respondent obtained a default judgment in said mortgage foreclosure action and proceeded to execute upon said judgment.

In the years that followed, execution was stayed on certain occasions pursuant to agreements by the Petitioner to make payments towards the note. Several such payments were made by the Petitioner including payments totaling $7,500.00 as late as 1994. After payments ceased in early 1995, however, the Respondent recommenced execution proceedings and a Sheriff's Sale of the property was scheduled for September 5, 1995. Notice of the sale was provided to the Petitioner and his spouse by a posting of the property. The Petitioner saw the posted notice and stayed the Sheriff's Sale by commencing a Chapter 11 Case pro se on September 1, 1995.

At the September 5, 1995 Sheriff's Sale, despite the automatic stay of **11 U.S.C. Section 362** being in effect which precluded the commencement or continuation of any action against the Petitioner, the Respondent rescheduled the sale for October 23, 1995 by oral announcement. The Petitioner, in full reliance upon the automatic stay resulting

from the commencement of his Chapter 11 Case, did not attend the originally scheduled sale on September 5, 1995 and thus never heard the announcement of the new sale date. The Respondent did not notify the Petitioner of the new October 23, 1995 sale date by mail, personal service, posting of the property, advertisement of any other method other than by having the rescheduling announced at the stayed Sheriff's Sale.

On October 17, 1995, after the Respondent had already rescheduled the Sheriff's Sale, the Respondent obtained relief from stay in the Bankruptcy Court. Neither the Motion for Relief from Stay nor the Order granting same made any reference to the newly scheduled sale date. Less than one week after the entry of the Order granting relief from stay, the property was sold at the rescheduled Sheriff's Sale. The purchaser was the Respondent herein who purchased the property for the costs of sale which was grossly below the actual value of the property.

b. Procedural Background

Once the Petitioner became aware of the Sheriff's Sale of his property, which awareness occurred several months after the sale itself, the Petitioner, as part of his Chapter 11 Case, commenced an Adversary Proceeding against the Respondent seeking to invalidate the Sheriff's Sale in that said sale had been scheduled in violation of the automatic stay provisions of **11 U.S.C. Section 362** and had occurred without sufficient notice of said sale to the Petitioner in violation of the Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution.

The Respondent moved to dismiss the Petitioner's Adversary Complaint and the Bankruptcy Court granted said motion finding that no violation of the automatic stay had occurred and that the applicable notice rules regarding Sheriff's Sales in Pennsylvania had been complied with.

The Petitioner voluntarily withdrew certain other issues raised in the Adversary Complaint and thus the Order dismissing the Petitioner's Complaint seeking an invalidation of the Sheriff's Sale became a final Order. The Petitioner filed a timely appeal to the District Court which affirmed the decision of the Bankruptcy Court. The District Court's decision was thereafter timely appealed to the United States Court of Appeals for the Third Circuit which affirmed the decision of the District Court. The Petitioner has timely sought a Writ of Certiorari in regard to the Third Circuit's decision by filing the instant Petition within ninety (90) days of said decision.

Argument In Support Of Granting Writ Of Certiorari

By the plain language of **11 U.S.C. Section 362**, the commencement of a Chapter 11 Case by the Petitioner on September 1, 1995 acted to stay the commencement or continuation of any legal action against him. Despite the existence of said stay, the Respondent did indeed continue

a proceeding against the Petitioner by appearing at a Sheriff's Sale which had originally been scheduled for September 5, 1995 and rescheduling same for October 23, 1995. As a result, the sale as rescheduled was a nullity and the property is still owned by the Petitioner.

The violation of the automatic stay committed by the Respondent was not merely a technical violation but rather was substantive and resulted in the Petitioner losing a valuable property right without notice and thus said violation deprived the Petitioner of his right to due process. If the Lower Courts were correct in rendering their decisions in this matter, then the Pennsylvania Rules of Civil Procedure regarding the noticing of a Sheriff's Sale and the provisions of **11 U.S.C. Section 362** currently fit together in such a way that a debtor can lose property in a sale without adequate notice. That result is at odds with the right to due process afforded under the Fourteenth Amendment to the United States Constitution.

Applying the considerations set forth in **Rule 10** of this Honorable Court's Rules, certiorari should be granted in this case because:

1) The issue presented herein involves an important question of federal law that has not been, but should be, settled by this Honorable Court. While there are cases which hold that the rescheduling of a Sheriff's Sale during the pendency of a Bankruptcy Case is not a violation of the automatic stay, this Honorable Court has never addressed the issue. Further, very few Courts have addressed the unique interplay between the automatic stay of **11 U.S.C. Section 362** and state law provisions for orally announced continuances of Sheriff's Sales as is provided for under Pennsylvania law which was applicable in this case. As occurred in this case, that interplay can wreak tragic results in that a debtor may one day find that a sale he or she never knew about has already occurred and that his or her property has been lost as a result.

2) The decision of the Third Circuit Court of Appeals in this matter is in conflict with the law of the Ninth Circuit on this same important issue. As is noted above, very few Courts have addressed the unique interplay between the automatic stay of **11 U.S.C. Section 362** and state law provisions for orally announced continuances of Sheriff's Sales. Where that interplay has been addressed, Courts have held that oral notice of the rescheduled sale date at the stayed Sheriff's Sale, even though in compliance with state law requirements, is insufficient to provide the notice mandated to comply with the due process requirements of the Fourteenth Amendment to the United States Constitution. See **In re: Duncan, 211 B.R. 42, 43 (Bankr. Ct. D. Ariz. 1997)**; **In Re Anderson, 195 B.R. 87, 90 (9th Cir. U.S. Bankr Appellate Panel, 1996)**; **In Re Acosta, 181 B.R. 477, 478 (Bankr. Ct. D. Ariz. 1995)**; **In Re Tome, 113 B.R. 626, 630 (Bankr. Ct. C.D. Cal. 1990)**. While the foregoing cases are from lower Courts within the

Ninth Circuit, the Court of Appeals for the Ninth Circuit has never overturned said decisions and the holdings of said cases represent the current law of the Ninth Circuit which is in complete conflict with the decision of the Third Circuit Court of Appeals rendered herein.

A. The Sheriff's Sale of October 23, 1995 Is A Nullity In That It Took Place In Violation Of The Automatic Stay Provisions Of 11 U.S.C. Section 362

Pursuant to **11 U.S.C. Section 362(a)(1)**, the filing of a petition for bankruptcy relief operates as a stay of "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Debtor ... (emphasis added)."

Pursuant to **Section 362(a)(2)** the enforcement, against the Debtor or against property of the Estate, of a judgment obtained prior to the commencement of a case under Title 11 is stayed. Further, pursuant to **Section 362(a)(3)**, any act to obtain possession of property of the

Estate or of property from the Estate or to exercise control over property of the Estate is stayed.

The Respondent's scheduling of a Sheriff's Sale in this matter for October 23, 1995 pursuant to an oral announcement at the September 5, 1995 Sheriff's Sale, when the Petitioner had commenced a Chapter 11 Case on September 1, 1995, was a clear violation of the automatic stay provisions of **11 U.S.C. Section 362**. The Respondent persisted in its action against the Petitioner, continued its action of scheduling a Sheriff's Sale and continued same to a new date certain, all despite the automatic stay. As a result, the scheduling of the sale was improper and the sale itself was null and void as having been continued in violation of the stay.

The Respondent's subsequent obtaining of relief from stay did nothing to change or cure the impropriety of the sale. There was no relief from stay when the Respondent continued the Sheriff's Sale on September 5,

1995 and rescheduled same for October 23, 1993. Relief from stay wasn't obtained until over a month later on October 17, 1995.

The language of **Section 362** is clear and unambiguous: continuation of a judicial, administrative or other action or proceeding against the debtor is prohibited. Also prohibited are any acts to gain possession of property of the estate or to enforce liens against said property.

As was noted by the United States Supreme Court in the case of **Garcia v. United States, 469 U.S. 70, 75, 83 L.Ed 2d 472, 105 S. Ct. 479**. "Only the most extraordinary showing of contrary intentions from the legislative history would justify a limitation on the plain meaning of the statutory language."

Statutory words should be given their ordinary meaning. **Perris v. United States, 444 U.S. 37, 42, 62 L.Ed 2d 199, 100 S. Ct. 311 (1979)**; See also **Taylor v. Freeland & Kronz, 503 U.S. 638, 118 L.Ed 2d 280, 112 S.**

Ct. 1655 (1992) and **Bank of Oregon v. IIAA, 508 U.S. 439, 124 L.Ed 2d 402, 113 S. Ct. 2173 (1993)**.

It is respectfully submitted that the Lower Courts in this case deviated from the plain meaning of **Section 362** when they determined that the rescheduling of a Sheriff's Sale while the automatic stay was in effect was not a violation of said stay. On the contrary, said rescheduling was the continuation of a proceeding against a debtor. Further, it was an act to enforce a judgment against a debtor and property of a debtor's estate. It was an act to obtain possession and control of, and to enforce a lien against, property of a debtor's estate. As such, the act of scheduling a sheriff's sale during the pendency of the automatic stay was a clear violation of said stay.

The Bankruptcy Court disagreed, stating on page 11 of its May 1, 1997 Opinion that: "...under the facts of this case the rescheduling of the sheriff's sale while the creditor promptly pursued a motion for relief from stay is not the type

of continuation ... of a judicial, administrative or other action or proceeding against the debtor ... that is prohibited per se by Section 362..."

In arriving at its conclusion, the Bankruptcy Court cited and relied upon a Pennsylvania Superior Court case, **Workingmen's Savings and Loan Association of Dellwood Corporation v. Restner, 438 Pa. Super. 186, 652 A.2d 327 (1994)**. Said case maintains that the rescheduling of a foreclosure sale while the automatic stay is in effect is not violative of the automatic stay but rather merely serves to maintain the status quo between creditor and debtor in that a scheduled sale simply remains in place and thus neither the creditor or the debtor gain an advantage as a result of the action taken.

The Lower Courts accepted the reasoning that an act which simply maintains the status quo is not violative of the stay. The Petitioner believes this to be an error of law on the part of the Lower Courts, and an improper deviation

from the plain meaning of **Section 362** which prohibits any acts. Even if the status quo concept were correct, however, it is inapplicable in this case because the status quo was not maintained. On the contrary, the rescheduling of the sale was done in a manner which deprived the Petitioner of notice and thus deprived him of any ability to exercise whatever rights he possessed in regard to the sale. The Petitioner went from being aware of a sale of his valuable property and being able to take steps to protect his interests therein, which he did, to being wholly unaware of a sale and having same occur, without the ability to bid, cure the debt to Respondent, seek State Court protections or do anything else.

In the case of **Workingmen's Savings and Loan v. Restner, supra**, a Pennsylvania Superior Court case which the Lower Courts relied upon in holding that the rescheduling of a sheriff's sale was not violative of the

automatic stay because it simply maintained the status quo, the Court stated:

> "Under the prevailing view, postponing a foreclosure sale is not violative of the automatic stay provisions ... Postponement notices which specify a new sale date merely preserve the status quo between creditor and debtor ... We agree that this is a correct view .... Such a view is entirely consistent with the protection intended by the automatic stay ..." **Id** at **328-329**.

First, it is improper for a State Court to make a proclamation as to the effect and scope of the automatic stay. Such questions are for the federal judiciary to decide.

Second, in support of its statement as to the "prevailing view" regarding the rescheduling of sheriff's sales during the pendency of the stay, the Pennsylvania Superior Court cited the case of **Zeoli v. RIHT Mortgage Corporation, 148 B.R. 698 (Dist. Ct. D.N.H. 1993)**.

In **Zeoli**, a situation similar to that involved herein occurred and the Court stated that:

> "The primary purpose of the automatic stay provisions are to effectively stop all creditor collection efforts, stop all harassment of a debtor seeking relief, and to maintain the status quo between the debtor and her creditors, thereby affording the parties and the Court an opportunity to appropriately resolve competing economic interests in an orderly and effective way. Maintaining the status quo is a repeating theme in decisions construing the automatic stay provisions." **Id**, at **700**.

The **Zeoli** Court went on to hold that the rescheduling of the sheriff's sale in that case simply maintained the status quo and thus did not violate the automatic stay. On the surface, is appears that **Zeoli** precludes the argument raised by the Petitioner herein, but on closer inspection that is not the case. The reason is due

to a substantial difference between the law of New Hampshire, applicable in **Zeoli**, and the law of Pennsylvania, applicable herein.

In New Hampshire, the law required that all of the parties originally notified of the originally scheduled sale were to be sent notice of the postponement. **Id.** at **698**. Thus, in **Zeoli**, the debtor knew of a sale. The debtor commenced a Chapter 7 Case to stay the sale. The creditor rescheduled the sale even though the automatic stay was in effect. That is all very similar to this case, but, the major difference in **Zeoli** is that the debtor was properly notified of the rescheduled sale date. The rescheduling was not simply announced at a stayed sale as occurred in this case. Thus, the debtor retained all of the rights it possessed in regard to the originally scheduled sale. The status quo truly was maintained and the creditor gained no advantage whatsoever.

In Pennsylvania, by contrast, **Rule of Civil Procedure 3129.2** allows for an oral continuation of a sheriff's sale by public announcement at the regularly scheduled sale. No other notice of any kind is required.

The Petitioner herein reasonably relied upon the stay provisions of **Section 362** and thus did not attend the September 5, 1995 Sheriff's Sale and did not hear the public announcement of the continuation. Other than said public announcement, which the Petitioner was not there to hear, there was no other notice given of the sale to take place on October 23, 1995, nor was any required under Pennsylvania law.

In light of the foregoing, the status quo was not maintained in this case. Unlike **Zeoli**, where the debtor was notified of the continued sale date, the Petitioner herein was wholly unaware that a sale had been scheduled and thus, unlike the debtor in **Zeoli**, the Petitioner could not exercise his rights in response to the newly scheduled sale. The

creditor, the Respondent herein, gained an advantage which he capitalized on by purchasing the property at a grossly depleted price thus reaping a windfall. To say that the status quo was maintained in these circumstances is simply erroneous. There was a clear violation of the automatic stay in this case and it is respectfully submitted that the Sheriff's Sale should be declared a nullity and the title to the property should be revested in the Petitioner.

B. The Sheriff's Sale, As It Occurred In The Circumstances Of This Case, Did Not Comport With The Precepts Of Due Process And Thus Is A Nullity On That Basis As Well

One of the most basic foundations of our legal system is that an individual may not be deprived of property without due process. In the case of **Mulane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 70 S. Ct. 652 94 L.Ed 865 (1950)** Justice Jackson spoke for this Honorable Court and said:

"Many controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum, they require deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." **Id.** at **656-7**.

Pennsylvania Courts have routinely held that deprivations of real estate are subject to due process limitations. **Grace Building Company v. Chester County Land Corp., 19 Pa. Cmwlth. 269, 271, 339 A.2d 161, 164 (1975). First Eastern Bank v. The Campstead, Inc., 423 Pa. Super. 241, 637 A.2d 1364 (1994).** In The **First Eastern** case, the Court stated:

"It is the notice which is indispensable to due process. Whatever mechanism is used, it must be reasonably calculated to appraise the interested parties of the pendency of the action and to afford

them the opportunity to present their objection." **Id** at **1366**.

It cannot be said that the violation of the stay herein was technical or harmless or maintained the status quo because it had the effect of depriving the Petitioner of meaningful notice of the sale. The Petitioner did not attend the September 5, 1995 Sheriff's Sale because same was stayed. Yet it was at this stayed sale that a new sale was scheduled. An oral announcement at a stayed sale was not notice that was reasonably calculated to appraise the Petitioner of the newly scheduled sale of his property. Further, once the Respondent sought relief from stay, he did not mention the new sale date in his motion for relief from stay and thus it cannot be argued that the Petitioner got notice in that manner.

Pennsylvania law regarding oral announcements of Sheriff's Sale continuances, when coupled with the automatic stay provisions of **11 U.S.C. Section 362**, turns

the automatic stay into a weapon against a debtor rather than a protection to a debtor. A debtor that relies upon the stay can end up having property sold out from under him without notice which is a violation of due process and is what occurred in this case.

This problem has been recognized in other jurisdictions which have Sheriff Sale continuance provisions similar to Pennsylvania's. In those jurisdictions, the oral continuance of a sale during a pending Bankruptcy Case has been found to provide insufficient notice to satisfy the requirements of due process. In the case of **In Re Acosta**, **181 B.R. 477 (Bankr. Ct. D. Ariz. 1995)**, the United States Bankruptcy Court for the District of Arizona faced a case with facts similar to those involved herein and a state law sale continuation procedure similar to that involved herein. The Court first noted that "Arizona State law only requires that any new sale date and time thereof simply be

announced orally at the previously scheduled sale date and time" **Acosta** at **478**.

The **Acosta** Court continued, noting that "It is standard practice in this jurisdiction for a mortgage company to orally postpone a foreclosure sale during the pendency of a bankruptcy proceeding because the actual foreclosure sale is stayed pursuant to **11 U.S.C. Section 362**. In the event relief from stay is granted or a case is dismissed, the mortgage holder will normally hold the foreclosure sale on the date for which no additional notice has been given. Because of the statutory scheme set forth for noticing a postponed foreclosure sale, it is foreseeable that a debtor would not realize that a foreclosure will occur until it is too late to respond.... The danger of foreclosure in the bankruptcy context is even greater...." **Id.**

The **Acosta** Court then concluded, after considering the Arizona oral continuance provision and the automatic stay of **11 U.S.C. Section 362**, as follows:

"... prior oral notice is deemed by this Court as not sufficient to allow such an extreme remedy or loss.... As in this case, where a foreclosure sale is continued and a debtor's case has been dismissed, more is required to apprise the debtor and other interested parties than the oral notice called for under the state statute and the Court holds herein that the Fourteenth Amendment to the United States Constitution requires due process to be accorded to a party before a creditor can divest the party's interest in property. Due process requires actual notice be given to a debtor prior to a foreclosure sale which is scheduled to occur after stay relief or the dismissal of a bankruptcy case." **Id** at **478-479**. (emphasis added).

The **Acosta** Court cited the case of **In Re Tome, 113 B.R. 626 (Bankr. Ct. C.D. Cal 1990)** in which the Court stated:

"Once relief from stay has been granted, secured creditors have traditionally assumed that they may proceed with foreclosure under state law uninhibited by any further limitations of bankruptcy law. The bankruptcy statute and rules are silent on this subject. The Court finds the assumption is not warranted: a secured creditor may not foreclosure on property of the estate without giving further notice beyond the minimum required by California law." **Tome** at **630**.

In the case of **In Re Duncan, 211 B.R. 42 (Bankr. Ct. D. Ariz. 1997)**, the rationale of **Acosta** and **Tome** was followed where the Court stated:

"The Court finds and concludes on this record that the facts of this case are substantially analogous to those of [Acosta]. The Court held in Acosta that due process requires actual notice to be given to the Debtor prior to a foreclosure sale which is scheduled

to occur after stay relief or dismissal of the Bankruptcy case... The Court finds and concludes that actual notice was not given to the Debtor of the continued sale date in this case ... and that the Debtor was not afforded proper due process under the facts of this case. **Id**.

In its Opinion issued herein, the Third Circuit Court of Appeals cited the case of **In Re Roche, 228 B.R. 102 (Bankr. Ct. M.D. Pa. 1998)** and quoted the following language therefrom regarding the rescheduling of sheriff's sales during the pendency of a Bankruptcy case: "Every court that has studied this specific issue (and has not been reversed) has found no violation." **Roche** at **103-104**. The Third Circuit, however, did not cite the next sentence of the **Roche** opinion which states "Indeed, those Courts that would support a cancellation of the sale have done so, not on the grounds that the postponement is a violation of the automatic stay, but for the reason that the due process

rights of the defendant have been violated by inadequate notice." **Id.** The Courts referred to in **Roche** were the Courts in **Acosta**, **supra** and **Duncan**, **supra**.

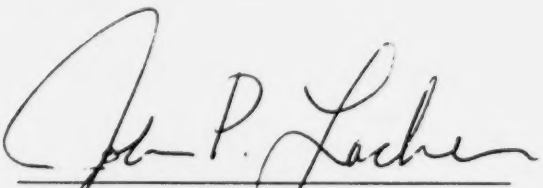
Acosta, **Duncan**, and **Tome** are all in complete conflict with the Third Circuit's decision herein. While said cases are by lower Ninth Circuit Courts, the holdings therein represent the law of the Ninth Circuit in that same have not been reversed by the Ninth Circuit Court of Appeals which has not addressed the issue directly. As such, there is a conflict in the circuits on this very important issue.

It is respectfully submitted that the Ninth Circuit has it right in this instance and the Third Circuit is in error. In any event, this is a matter which should be addressed by this Honorable Court so that the state of the law is clear and both debtors and creditors will know their rights in these situations.

Conclusion

Based upon all of the foregoing, it is respectfully submitted that this case should be addressed by this Honorable Court and that a Writ of Certiorari should be granted in this case.

Respectfully submitted,



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APPENDIX

Filed June 2, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3341

HARVEY TAYLOR,

Appellant

v.

THOMAS MCCUNE SLICK, individually and as Executor of the ESTATE OF DOROTHY M. BALLANTINE, Deceased

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On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 97-cv-02085)
District Judge: Hon. Donald J. Lee

Argued: May 5, 1999

Before: STAPLETON, LEWIS and ALDISERT,
Circuit Judges,

(Filed June 2, 1999)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

We are to determine whether the continuation of a sheriff's sale, following the filing of a bankruptcy petition, violates the automatic stay provisions of 11 U.S.C. § 362(a), and whether a Pennsylvania rule of civil procedure that permits oral notice of the continuation and rescheduled sale date is sufficient to protect a debtor's due process rights. The bankruptcy court held that the postponement of the sale of property owned by the debtor, Harvey Taylor, did not violate § 362(a) and that Taylor's due process rights had not been violated by a subsequent sheriff's sale. The district court dismissed Taylor's appeal. We will affirm.

I.

Taylor and his wife purchased 20 acres of land in Westmoreland County from Martha Ballantine for $72,450.00. A note and mortgage were executed on December 16, 1981, with the entire purchase price to be paid by September 18, 1982. Thomas McCune Slick, as Ballantine's executor, instituted foreclosure proceedings in 1989 because Taylor had defaulted on the mortgage.

Several unsuccessful attempts were made to effectuate personal service of the complaint in mortgage foreclosure. An order was entered, on August 31, 1990, permitting Slick to make substitute service on Taylor by certified and regular mail and by posting the property. The order further stated:

> Should this case proceed to execution and sale, this Order for Service shall apply to the Notice pursuant to Rule 3129 [of the Pennsylvania Rules of Civil Procedure] which is required to be served upon [Taylor], allowing perfection of service in the same manner as provided for herein. [Slick] ha[s] conducted a reasonable search for [Taylor] but ha[s] been unable to further locate [him] beyond [his] residence in McKeesport, Pennsylvania. The manner of service

> provided for herein is the most reasonably likely method of achieving service in this case.

App. at 176a. The sheriff served the notice and complaint in accordance with this order. A default judgment was entered against Taylor on October 24, 1990, in the amount of $43,863.61. A Writ of Execution in Mortgage Foreclosure was issued and served by certified and regular mail and posted on the property. The Writ was stayed and reissued on several occasions, as a result of agreements between the parties that Taylor would make payment. Taylor made only sporadic payments from 1990 through 1994.

Taylor filed a Chapter 13 bankruptcy petition on February 3, 1995. The petition was dismissed on February 22 for failure to file required documents. Slick filed another Writ of Execution on May 31, 1995, in accordance with the requirements of the August 31, 1990 order and Taylor received notice of the filing of the writ.

A sheriff's sale was scheduled for September 5, 1995, but on September 1, 1995, Taylor filed a Chapter 11 bankruptcy petition. By oral public announcement at the time and location of the proposed sheriff's sale, the sale was continued to October 23, 1995, in accordance with Rule 3129.3(b), Pennsylvania Rules of Civil Procedure, which states:

> If the sale is stayed, continued, postponed or adjourned to a date certain within one hundred days of the scheduled sale, and public announcement thereof, including the new date, is made to the bidders assembled at the time and place originally fixed for the sale, no new notice shall be required, but there may be only one such stay, continuance, postponement or adjournment without new notice.

On October 17, 1995, Slick sought relief from the automatic stay of the sale. Although Taylor received notice of Slick's motion for relief which did not state that the sale was scheduled for October 23, he did not respond or attend the hearing before the bankruptcy court. Slick obtained relief from the stay, and the sale took place as scheduled. Slick was the high bidder for the property. The sheriff's deed was executed on January 16, 1996, and recorded the

following day. Taylor's bankruptcy petition was dismissed on December 21, 1995, reopened and reinstated *nunc pro tunc* on January 8, 1996, and dismissed again on July 9, 1996.

Taylor filed an adversary complaint in the bankruptcy court on December 31, 1996, and contended, *inter alia*, that the continuance of the sheriff's sale, after he had filed his bankruptcy petition, violated 11 U.S.C. § 362(a)(1) and therefore voided the sale, and that the subsequent sale was conducted without proper notice, in violation of his due process rights.

The bankruptcy court granted Slick's motion to dismiss the adversary complaint on the basis that there had been no violation of the automatic stay rule set forth in 11 U.S.C. § 362(a)(1), and that Appellant had received adequate notice under bankruptcy rules and Pennsylvania law. Appellant withdrew his remaining claims in order to appeal the issues presented here. After oral argument, the district court dismissed Appellant's appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 158(d). We review the bankruptcy court's factual findings for clear error, but conduct plenary review of the bankruptcy court's and district court's legal conclusions. *In re Cohen*, 106 F.3d 52, 55 (3d Cir. 1997).

II.

This court has not previously addressed whether the postponement or continuation of a sheriff's sale violates the automatic stay provisions of 11 U.S.C. § 362(a). We are persuaded by a consistent line of cases from other courts, however, and hold that the continuance of a sheriff's sale in accordance with state law procedure during the pendency of an automatic stay does not violate § 362(a)(1). *See, e.g., In re Peters*, 101 F.3d 618 (9th Cir. 1996); *In re Roach*, 660 F.2d 1316 (9th Cir. 1981); *In re Fritz*, 225 B.R. 218 (E.D. Wash. 1997); *Zeoli v. RIHT Mortgage Corp.*, 148 B.R. 698 (D.N.H. 1993); *In re Tome*, 113 B.R. 626 (Bankr. C.D. Cal. 1990); *Workingmen's Savings and Loan Ass'n of Dellwood Corp. v. Kestner*, 652 A.2d 327 (Pa. Super. Ct. 1994); *see also In re Roche*, 228 B.R. 102, 103-104 (Bankr.

M.D. Pa. 1998) ("[E]very court that has studied this specific issue (and has not been reversed) has found no violation.").

In relevant part, 11 U.S.C. § 362(a)(1) provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay applicable to all entities, of —
>
> (1) the commencement or *continuation*, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Debtor that was or could have been commenced before the commencement of the case.

11 U.S.C. § 362(a)(1) (emphasis added). "The primary purposes of the automatic stay provisions are to effectively stop all creditor collection efforts, stop all harassment of a debtor seeking relief, and *to maintain the status quo* between the debtor and [his] creditors, thereby affording the parties and the Court an opportunity to appropriately resolve competing economic interests in an orderly and effective way." *Zeoli*, 148 B.R. at 700 (emphasis added). We must therefore decide whether a continuation of a sheriff's sale serves to maintain the status quo between the debtor and his creditors or whether it constitutes "a judicial, administrative, or other action or proceeding" prohibited by § 362(a)(1).

According to the principle of *noscitur a sociis*, the word "continuation," as used in § 362(a)(1), must be read in conjunction with other words that surround it, such as "commencement." Upon such examination, it becomes apparent that the filing of a bankruptcy petition prohibits the beginning ("commencement") of a judicial proceeding and the carrying forward ("continuation") of a proceeding that has already begun.

The "continuation" of a sheriff's sale, on the other hand, connotes the postponement of a proceeding, and effectuates the purposes of § 362(a)(1) by preserving the status quo until the bankruptcy process is completed or until the creditor obtains relief from the automatic stay. *See Workingmen's Savings*, 652 A.2d at 328 ("Postponement

notices which specify a new sale date merely preserve the status quo between creditor and debtor."); *see also Zeoli*, 148 B.R. at 701 ("The postponement of a foreclosure sale is certainly an 'act.' But it is not an act in 'continuation' of a proceeding 'against the debtor' prohibited by § 362(a)(1). Rather, it is more appropriately characterized as an act in preservation of a stayed proceeding."). A postponement notice does not, by itself, permit the rescheduled sheriff's sale to occur. So long as the bankruptcy petition is pending before the bankruptcy court, a creditor must apply for and obtain relief from the stay before it can proceed with the sale on the date certain. Rule 3129.3(b), Pennsylvania Rules of Civil Procedure, preserves the status quo and permits the creditor to avoid duplicative foreclosure costs that would eventually be deducted from the proceeds of the sale (to the disadvantage of the debtor). *See Zeoli*, 148 B.R. at 701. It is therefore clear that Rule 3129.3(b) comports with § 362(a)(1).

Once Taylor filed his bankruptcy petition here, the sale was postponed. Although a new proposed sale date was announced, no act had occurred that prejudiced Taylor or otherwise altered his position with respect to the property. In accordance with the Bankruptcy Code, Slick then sought relief from the stay and served notice on Taylor. Taylor did not respond to the motion for relief, and relief was granted Slick pursuant to 11 U.S.C. § 362(d).[1] Upon receiving relief from the stay, Slick was permitted to proceed with the sheriff's sale so long as notice requirements had been met. The bankruptcy court properly rejected Taylor's argument that the continuation of the sheriff's sale violated § 362(a)(1).

III.

Taylor's argument that Pennsylvania Rule 3129.3(b)

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1. In relevant part, § 362(d) states:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay— . . . .

violates the Due Process Clause likewise fails. To be sure, Taylor is entitled to due process with respect to the sheriff's sale of his property, *see First Eastern Bank v. The Campstead, Inc.*, 637 A.2d 1364, 1366 (Pa. Super. Ct. 1994) (mortgage foreclosures are subject to due process requirements), but Taylor exaggerates the process he is due under the Constitution. Because Taylor is not entitled to individualized written notice of the rescheduled sale, and because proper notice was provided pursuant to Rule 3129.3(b), we will affirm the judgment of the district court.

" '[A]dequate notice detailing the reasons for a proposed termination' of a constitutionally protected liberty or property interest must be afforded to individuals prior to the deprivation." *Sullivan v. Barnett*, 139 F.3d 158, 172 (3d Cir. 1998), *rev'd on other grounds sub nom. American Manufacturers Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977 (1999) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970)). To satisfy due process requirements, the notice provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995); *First Eastern Bank*, 637 A.2d at 1366. The level of notice to be given, however, depends on the interest at issue because "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Taylor concedes that he received notice of the original sale and states that he voluntarily chose not to attend the September 5, 1995 sale in reliance on the bankruptcy petition he had filed four days earlier. His decision not to attend the original sale in which notice was given in accordance with Rule 3129.3(b), however, does not amount to a violation of due process.

We hold that the notice requirement contained in Rule 3129.3(b) is reasonably calculated to reach interested parties to a sheriff's sale. The interested parties are the debtor, the creditor and the potential bidders for the property. In light of the Pennsylvania Superior Court's

teachings in *Workingmen's Savings, supra*, it is reasonable to expect that notice of a continuation of a sale will be announced at the scheduled sale date—because potential bidders will likely be unaware that the debtor has filed a bankruptcy petition—but it is not reasonable for a debtor to choose not to attend the scheduled sale simply because he knows that the sale will not be consummated at that time because of his *ex parte* intervention in the bankruptcy court. Because it can be expected that the debtor, the creditor and potential bidders will attend the sale, oral notice as provided by Rule 3129.3(b) comports with notions of due process.

Although one in Taylor's position is entitled to believe that the sheriff's sale will not be consummated on the original date, he is not entitled to believe that no sale will occur until his bankruptcy petition has been adjudicated. Not only does the oral notice of the date of the rescheduled sale comport with due process, but the debtor's rights are further protected by the requirements that he receive notice both of the hearing on the motion for relief from the automatic stay and of the subsequently entered order lifting the stay. Those two notices serve to further alert the debtor to the fact that the executing creditor is attempting to effectuate the sheriff's sale without further delay and expense. Taylor, however, chose to lie doggo. He chose to ignore the motion to lift the stay, the hearing held before the bankruptcy court and the order lifting the stay.[2] He chose not to utilize the courts of Pennsylvania to challenge the sale. He took no action to contest the legitimacy of the October 23, 1995 sale until a year and two months later when he filed his complaint in the bankruptcy court on December 31, 1996. Taylor's studied attempts to remain elusive throughout the foreclosure process may not serve as a basis for a ruling that he suffered a deprivation of his right to due process.

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2. Taylor argues in his complaint that he did not receive notice of the hearing on the motion to lift the stay. The district court deemed him to have received notice based upon the presumption that arises from the mailing of a properly addressed notice, and Taylor does not challenge this ruling before us. Moreover, Taylor does not allege that he failed to receive notice of the order lifting the stay.

Taylor's conduct aside, the Pennsylvania rule must be evaluated in conjunction with the purpose of the notice requirement in the context of a sheriff's sale. The continuation of a sheriff's sale and public announcement of a new date are intended to assure notice to bidders interested in the subject property. *See, e.g., Greater Pittsburgh Business Development Corp. v. Braunstein*, 568 A.2d 1261, 1265 (Pa. Super. Ct. 1990). The debtor's true interest is to ensure that notice is given to potential bidders, rather than to ensure that the debtor receives notice, because the debtor is generally just a spectator who is concerned that the sale, whenever it may occur, brings the highest sale price possible. *See id.*; *Investors & Lenders Ltd. v. Finnegan*, 592 A.2d 1244, 1248 (N.J. Super. Ct. Ch. Div. 1991). Rule 3129.3(b) strikes a proper balance between providing notice to interested parties and allowing the creditor to avoid paying duplicative fees.

Here, Taylor suffered no constitutional disadvantage as a result of his voluntary absence from the originally scheduled sale. For him to contend now that he was prejudiced by his failure to receive notice of the new sale date when it was given is truly disingenuous. Taylor has not contended that he was deprived of the ability to bid on the property, nor has he established that the notice given resulted in the property being sold at too low a price because bidders were not aware of the continued sale date. Even were he to present such a contention, it would necessarily fail on the facts presented here. *See, e.g., Workingmen's Savings*, 652 A.2d at 329 ("Because the sheriff's sale was properly held on due notice, appellants were not improperly denied an opportunity to cure their default. The opportunity to cure their default was lost by [appellants'] failure to tender the amount necessary to reinstate the mortgage and not because of any defect in the foreclosure proceedings."). Taylor had several opportunities, before filing his adversary complaint, to contest the validity of the sale. *See Roche*, 228 B.R. at 105 ("Even should there have been some injustice by reason of the circumstances of the sale, nothing prevented raising this issue before the county court under Pa.R.C.P. 3132, once the Debtors became aware of the sale."). He chose not to avail himself

of these opportunities, and as a result, we conclude that he cannot prevail in his due process claim.

The judgment of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: HARVEY TAYLOR,	)
Debtor.	) Civil Action No. 97-2085) Bankruptcy No. 95-23393-JFK
HARVEY TAYLOR,	)
Plaintiff/Movant,	)
vs.	)
THOMAS McCUNE SLICK, individually and as Executor of the ESTATE OF DOROTHY M. BALLATINE, Deceased,	)
Defendant/Respondent	)

MEMORANDUM OPINION

May 5, 1998

Harvey Taylor ("plaintiff), the debtor in the above Chapter 11 case and the plaintiff in the above adversary proceeding, has moved for leave to appeal an order of the Bankruptcy Court of May 1, 1997, granting the motion to dismiss of the respondent, Thomas McCune Slick, individually and as Executor of the Estate

of Dorothy M. Ballatine, deceased ("defendant") which denied the motion to dismiss in part and granted it in part as follows: (i) Count I and Count VI of the debtor's complaint were dismissed with prejudice insofar as they concerned property at issue in Count I and the Court ruled that Counts II, III, IV and V remain active with respect to the claim of the debtor for wheat and straw allegedly improperly harvested by the defendant after the foreclosure sale of real estate consisting of approximately 20 acres and situate in Sewickley Township, Westmoreland County, Pennsylvania.

The defendant obtained a default judgment in a mortgage foreclosure proceeding on the subject property in 1990 in the Court of Common Pleas of Westmoreland County, Pennsylvania. Writs of execution were issued at various times and stayed by agreement of the parties. The plaintiff filed a petition for the Chapter 11 proceedings on September 1, 1995, to stay a sheriff sale scheduled for September 5, 1995. Because the bankruptcy was filed two days

prior to the scheduled sale, the sheriff sale was continued to October 23 *1995*, by oral announcement at the time and place set for the sheriff sale and pursuant to Pa.R.C.P. 3129.3. The defendant then obtained a default order granting relief from stay on October 17, 1995, and the sheriff sale took place on October 23, 1995. Thereafter, a sheriff's deed was executed on January 16, 1996, and recorded on January 17, 1996, all before the debtor filed any motions in the Bankruptcy Court concerning lack of notice of the sale which he alleges. At no time did the plaintiff seek reconsideration, appeal or attempt to stay any orders of the court of the sale.

Subsequently, on August 21, 1997, because of stipulations of the plaintiff and defendant, the Bankruptcy Court entered judgment in favor of defendant and against plaintiff on Counts II, III, IV and V.

The Bankruptcy Court ruled adversely to the plaintiff's contention that (i) the postponement of the sale violated the

automatic stay provisions of Title 11 U.S.C. § 362, and (ii) plaintiff's alleged lack of notice of the hearing on the motion for relief from stay deprived him of due process.

The Bankruptcy Court, relying on the prevailing view, held the postponement of the sale merely preserved the status quo between the parties and was not violative of the automatic stay provisions.[1]

Moreover, the Bankruptcy Court, in finding that notice of the motion for relief from stay was properly given to the plaintiff, pointed out that while plaintiff claims he did not receive notice of the hearing or the motion, he does not claim he did not receive a

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[1] Matter of Roach, 660 F.2d 1316 (9th Cir. 1981); In re de Jesus Saez, 721 F.2d 848 (1st Cir. 1983); Zeoli v. RIHT Mort. Corp., 148 B.R. 698 (D.N.H. 1993); Workingmen's Say. and Loan Ass'n. of Dellwood Corp. v. Kestner, 438 Pa. Super. 186, 652 A.2d 327 (Pa. Super. 1994), ~ see In re Demp, 23 B.R. 239 (Bankr. E.D. Pa. 1982) (Creditors' act of scheduling sheriff sale after a Chapter 7 petition had been filed and after receiving specific instructions not to take further action to collect, was deemed a violation of § 362(a)(1).

copy of the order granting relief from stay from which no appeal or motion for reconsideration was filed.

Discussion

On appeal from an order of the Bankruptcy Court, the district court must apply the clearly erroneous test of factual findings and plenary review to questions of law

Moreover, mixed questions of law and fact must be divided into the respective components and the appropriate test applied. In re Brown, 951 F.2d 564 (3d Cir. 1991).

After a review of the record, the arguments and memoranda of the parties, the Court finds that the Bankruptcy Court's findings of fact are not clearly erroneous and that the Bankruptcy Court did not err with regard to the applicable questions of law.

The Court finds the prevailing view whereby the postponement of a foreclosure sale is not violative of the automatic stay provisions, is persuasive.

Moreover, the Court finds there is ample evidence in the record to support the Bankruptcy Court's finding that the plaintiff was given proper notice of the motion for stay.

Therefore, an order will be entered dismissing the appeal.

Lee, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	
HARVEY TAYLOR,	)
	)
Debtor.	) Civil Action No. 97-2085
	) Bankruptcy No. 95-23393-
HARVEY TAYLOR,	) JFK
	)
Plaintiff/Movant.	)

ORDER OF COURT

AND NOW, this 5th day of May, 1998, it is hereby **ORDERED that** the appeal Harvey Taylor, the debtor in the above Chapter 11 case and the plaintiff in the above adversary proceeding, is **DISMISSED.**

Donald J. Lee
United States District Judge

cc Robert O. Lampl, Esquire
John Lacher, Esquire
960 Penn Avenue
Suite 1200
Pittsburgh, PA 15222

Terance O'Halloran, Esquire
15 East Otterman Street
Greensburg, PA 15601

Wayne Whitehead, Esquire
100 North Main Street
Greensburg, PA 15601

Clerk, U.S. Bankruptcy Court
Western District of PA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	
Harvey Taylor,	(Bankruptcy No.
Debtor	(95-23393 JKF
	(
Harvey Taylor,	(Chapter 11
Plaintiff	(
v.	(Adversary No.
	(96-2584
Thomas McCune Slick,	(
individually and as	(
Executor of the Estate	(
of Dorothy M. Balentine,	(
Deceased,	(
Defendant	(

Appearances:

Robert O. Lampl, Esq., and John P. Lacher, Esq., Counsel for Debtor

Terence O'Halloran, Esq., and Wayne Whitehead, Esq., Counsel for Defendant

MEMORANDUM OPINION

The matter before the court is the motion of Thomas McCune Slick to dismiss Debtor's complaint. Because we will consider matters outside the pleadings, as reflected on the state court docket and in the briefs, we will treat this motion as a motion

for summary judgment Fed.R.Civ.P. 12(b). See also Fed.R.Civ.P 56. The complaint concerns approximately 20 acres of real estate located at R.D. #1, West Newton, Sewickley Township, Westmoreland County, Pennsylvania. Slick is the executor of the estate of Dorothy M. Balentine, the mortgagee.[1] Slick obtained a default judgment in mortgage foreclosure in 1990 in the Court of Common Pleas of Westmoreland County, Pennsylvania.. Writs of Execution were issued at various times and stayed by agreement of the parties. Debtor filed the instant chapter 11 on September 1, 1995, to stay a sheriff's sale scheduled for September 5, 1995. Because the bankruptcy was filed a few days before, the sheriff's sale was continued to October 23, 1995, by oral public announcement at the time and place set for the sheriff's sale pursuant to Pa.R.Civ.P. 3129.3. Slick obtained a default order granting relief from stay on October 17, 1995, and the sheriff's sale took place on October 23, 1995

[1] The complaint names Slick individually and as executor of Balentine's estate .

Debtor's complaint consists of six counts. Count I seeks a declaratory judgment invalidating the sale and decreeing his ownership of the acreage. Debtor alleges that the continuation of the sheriff's sale postpetition violated the automatic stay and, therefore, the sale is void. In the general averments of the complaint, Debtor also alleges that he did not receive notice of the motion for relief from stay filed by Slick in this case. If he had, he contends, he could have shown that there was a substantial equity cushion in the property, thereby preventing entry of an order granting relief from stay.

Counts II, III, IV, and V are related Count II seeks a judgment against Slick for conversion of wheat and straw Debtor planted on the property in 1995 that was harvested and sold by Slick in August, 1996. Count III seeks a judgment against Slick for unjust enrichment arising from the harvesting sale of the wheat and straw by Slick. Debtor avers that he did all the work and Slick reaped the profits.

Count IV seeks an accounting concerning the wheat and straw and the amount of the claim based on the mortgage note. With respect to the latter, Debtor specifically challenges the ten

percent post-judgment interest rate charged by Slick. Count V is captioned "Objection to Claim" and states, in part,

> 45. The Defendant's alleged claim is based upon an erroneous interest calculation on the allegations concerning the wheat, straw, and interest rate.
>
> 46. The Defendant's alleged claim provides no credit for the wheat and straw wrongfully taken from the property.
>
> Wherefore, it is respectfully requested that the Honorable court dismiss the Defendant's claim and/or make a determination as to the proper amount of said claim.

Slick has not filed a proof of claim in this bankruptcy case and Debtor did not file one on Slick's behalf. Slick obtained a judgment in foreclosure and, after obtaining an order of this bankruptcy court granting relief from stay, executed on the judgment Unless there are grounds to vacate the order granting relief from stay and set aside the sheriff's sale, Slick is the owner of the property. Because there is no proof of claim based on a deficiency, Debtor's objection to claim is not cognizable.[2]

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[2]Debtor's "Objection to Claim" also can be construed as an objection to the claim upon which the default judgment in mortgage foreclosure was entered. That judgment was entered in 1989 and was never appealed or

Finally, Count VI is captioned "Equitable Recoupment" Debtor alleges that Slick, whose property is adjacent to the 20 acres at issue, allowed his livestock to enter on the 20 acres and eat or otherwise destroy Debtor's crops.

The motion to dismiss alleges that this court lacks jurisdiction over this adversary because the court granted relief from stay, after which the property was sold at sheriff's sale The motion also asserts that all of the issues raised in the complaint have or could have been litigated in numerous state and bankruptcy actions and that Debtor is merely attempting to use this forum to relitigate issues previously decided.

Based on the record before us and the applicable law we will grant Slick's motion to dismiss with respect to Count I and Count VI. The only issues remaining, therefore, are those based on Counts II, III, IV, and. V concerning the wheat and straw. There

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otherwise challenged in the state court, according to the record before us. In fact, Debtor admits that he paid "sporadically" up to the time that Slick obtained the foreclosure judgment and ceased payments in early 1995. ~ Complaint at ¶ 8; Brief in Opposition to Motion to Dismiss at 2. But see Brief in Support of Motion to Dismiss at 2 (payments ceased in June of 1994) . A collateral attack, on the validity of the default foreclosure judgment at this juncture is not warranted and we will not consider it.

are insufficient facts alleged of record concerning Debtor's allegations with respect to the wheat straw to permit dismissal or summary judgment. The state had entered a temporary injunction preventing Debtor from interfering with Slick's harvesting and sale of the standing wheat crop but it was dissolved because the wheat had been harvested before a full hearing on the merits. The record before us does not support Slick's contention that the parties rights concerning the wheat were litigated in the state court. Furthermore, the parties' rights in this regard may depend on the terms of the mortgage and note which are not part of the record.

With this background, we proceed to the facts. Because Debtor alleges that he never received notice of the motion for relief from stay, this court will exercise jurisdiction to determine whether the bankruptcy process has been followed and Debtor's right to due process protected At this stage of the litigation, we construe the facts in the light most favorable to Debtor as the non-moving party

In 1981 Debtor and his wife, who is not a debtor in this case, purchased from Martha J. Balentine approximately 20 acres

of real estate in Westmoreland County for $72,450. The property is not Debtor's residence. A note and mortgage were executed on December 16, 1981. The amount owed was due in full on September 18, 1982, according to Slick. See Brief in Support of Motion to Dismiss at 1. Debtor was required to make three equal payments of $14,875 plus interest at ten percent per annum Thomas McCune Slick, Mrs. Balentine's executor instituted foreclosure proceedings in 1989 because Debtor had defaulted on the mortgage.[3] Attached to Slick's motion to dismiss is the relevant portion of the Westmoreland County Court of Common Pleas docket sheet.[4] Personal service of complaint in mortgage foreclosure was attempted on or about October 31, 1989, and was

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[3]Debtor alleges that he has paid more than $70,000 over the years. Even if this is true, it does not follow that Debtor was not in default on the mortgage. Moreover, he admitted in his complaint that he paid only sporadically and lest made a payment in 1994 or 1995 on a note and mortgage that matured in 1982 and had been subject to a foreclosure judgment since 1990. Complaint at ¶ 8, Brief in Opposition to Motion to Dismiss at 2 (payments ceased in 1995); Brief in Support of Motion to Dismiss at 2 (payments ceased in 1994).

[4]The docket sheet covers the period up to approximately February of 1995. For the period thereafter and until August 1996, Slick provided the Westmoreland County Civil System Case History Listing. Debtor also attached to his complaint a portion of the Case History Listing. Unless otherwise noted, references to the state court docket in this Memorandum Opinion include both documents.

unsuccessful as indicated by a docket entry of that date showing that the sheriff's return of "not found" was filed. Praecipes to reinstate the complaint were filed on July 30 and September 17 of 1990.[5] The docket reflects that an order was entered on August 31, 1990 permitting substitute service of the complaint on Debtor his wife by certified and regular mail and by posting the premises. The order further provides that

> Should this case proceed to execution and sale, this Order for Service shall apply to the Notice pursuant to Rule 3129 which is required to be served upon The Defendants [Debtor] , allowing perfection of service in the same manner as provided for' herein. The Plaintiffs [Slick] have conducted a reasonable search for the Defendants but have been unable to further locate them beyond their residence in McKeesport, Pennsylvania. The manner of service provided for herein is the most reasonably likely method of achieving service in this case.

A docket entry for September 20, 1990, states that the sheriff served the notice and complaint on Debtor and his wife by certified and regular mail and posted them on the property On October 24, 1990, default judgment was entered against Debtor and his wife as follows:

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[5]The entry "Plff's Motion for Service Complaint. Eo Die: Atty's Affidavit of Reasonable Search" also appears on September 17, 1990.

unpaid principal balance:	$26,852.03
interest at 10 % from 6/19/84 to 9/20/89:	$14,326.38
attorney's commission of 10%:	$ 2,685.20

The total judgment was for $43,863.61 with interest from September 21, 1989, at "10.0% per annum and costs". Notice of entry of the judgment was sent to Debtor and his wife pursuant to Pa.R.Civ.P. 3129.2. Also on October 24, 1990, a Writ of Execution in Mortgage' Foreclosure was issued and an Affidavit Under Rule of Civil Procedure 3129.1 was filed as required by the Pennsylvania Rules of Civil Procedure. On October 29 and November 2, 1990, the Writ was served by certified and regular mail on Debtor and his wife in accordance with Pa.R.Civ.P 3129.2. It was posted on the property on November 9, 1990. The docket reflects that the Writ was stayed and reissued several times. According to Debtor's brief, this occurred as result of agreements between the parties that Debtor would make payment. Debtor admits that he made payments sporadically into 1994 but ceased to make payments early in 1995, according to Debtor, Brief at 2, and in June, 1994, according to Slick, Brief at 2. A Westmoreland County Court of Common Pleas docket entry of February 14, 1995, notes that the Writ was stayed again in light of the filing of Debtor's first bankruptcy on February 3, 1995, a chapter 13 filed at

Bankruptcy No. 95-20353. The chapter 13 was dismissed on February 22, 1995, for failure to file required documents.[6]

An order dated May 31, 1995, was entered on the docket on June 1, 1995, and authorized service of the Writ of Execution by publication. This order reconfirmed the order of August 31, 1990, authorizing substitute service.[7] The Writ of Execution was served on Debtor and his wife in July of 1995 by regular and certified mail and by posting the property. Debtor admits in his complaint that he received this notice. See Complaint at ¶ 17 A sheriff's sale was scheduled for September 5, 1995 Debtor filed this chapter 11 on September 1, 199.5. Because of the pendency of the bankruptcy case, The sale was continued rescheduled for October 23, 1995, by oral public announcement at the time and place of the September 5,

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[6]Debtor's counsel in the current chapter 11 proceeding was his bankruptcy attorney at that time.

[7]The order of August 31, 1990, was entered to allow substitute service of the complaint and made applicable to the execution and sale of the property. Pennsylvania Rule of Civil Procedure 430 provides that plaintiffs who have been unsuccessful in making service may request a special order from the court directing the method of service. The plaintiff is required to file an affidavit stating "the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made." Pa.R.Civ.P. 430(a). See also Pa.R.Civ.P. 3129.

1995, sale. Slick obtained relief from stay on October 17, 1995 The sale was conducted on October 23, 1995 The sheriff's deed was executed on January 16, 1996, and recorded on January 17, 1996, all before Debtor filed any motions in this court concerning his alleged lack of notice of the sale At no time did Debtor reconsideration appeal or attempt to stay any orders of this court or the sale. Under these circumstances, the relief Debtor seeks is moot. Cf., United States v. Fitzgerald, - F.3d 1997 WL 157328 (8th Cir. April 7, 1997) (after foreclosed property is sold to bona fide third-party purchaser, court generally lacks power to craft adequate remedy for debtor) This adversary action was not commenced until December 31, 1996, nearly one year after the deed was recorded and. 14 months after relief from stay was granted and the sale conducted. Meanwhile, Debtor again failed to comply with bankruptcy requirements and this chapter 11 case was dismissed by order entered December 21, 1995 It was reopened and reinstated *nunc pro tunc* on January 9, 1996. The case was again dismissed by order dated July 9, 1996, on the United States Trustee's oral motion for failure to comply with court orders. Ten

days later, Debtor filed a motion for reconsideration and an order reopening the case was entered on September 6 1996.[8]

Debtor contends that the continuation of the sale violated automatic stay, thereby nullifying it, even though the sale was not conducted until after relief from stay was granted. He contends that the sale was held in violation of state rules of civil procedure. Debtor challenges the order granting relief from stay on the ground that he did not receive notice of the hearing on the motion for relief from stay. We address this last argument first.

It is well settled that if a notice is properly addressed and mailed, there is a rebuttable presumption that notice was proper In re Rosage, 189 B.R. 73, 79 (Bankr.W.D.Pa. 1995. The certificate of service filed with respect to the motion for relief from stay reflects that the notice and motion for relief from stay were mailed to Debtor at the address of record on the bankruptcy docket, the same address to which all state court notices were mailed. It is

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[8]An issue arose during a pretrial conference as to whether the bankruptcy was pending at the time of the sale. The historical review shows that this case was pending when the sheriff's sale took place.

Debtor's burden to establish that notice was not properly addressed and mailed; the issue is not whether the notice was received.[9] Id. Debtor alleges nothing to rebut the presumption that The notice concerning the motion relief from stay was properly addressed and mailed. Accordingly, Debtor's challenge to the order granting relief from stay on the ground that he did not receive notice of the hearing or the motion is without merit Moreover, Debtor does allege that he did not receive the order granting relief from stay. No appeal or motion for reconsideration was filed at any time

We now address Debtor's contention that the oral postponement of the sale by public announcement violated the stay, thereby voiding the sale We conclude that under the facts of this case the rescheduling of the sheriff's sale while the creditor promptly pursued a motion for relief from stay is not the type of "continuation of a judicial, administrative, or other action or

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[9] In his brief in opposition to Slick's motion to dismiss the adversary Debtor notes that he was acting *pro se* when the motion for relief from stay was served and filed and the order entered. This fact in and of itself is an insufficient basis upon which to grant the relief Debtor is requesting and does not in any way negate the presumption that the notice of the hearing on the motion for relief from stay was-properly addressed and mailed, pursuant to the certificate of service filed of record.

proceeding against the debtor that was or could have been commenced before the commencement of the case," 11 U.S.C §362(a), that is prohibited *per* se by §362 of the Bankruptcy Code. Continuation the context of §362(a) means to carry forward or persist **WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY** 305 1984). The continuance or rescheduling of the sheriff's sale simply maintained the status quo pending further proceedings in the bankruptcy case. See id. (continue . . . 3. To cause to remain or last: RETAIN . . . 5. . . To postpone or adjourn (a judicial proceeding" Such continuances often occur in bankruptcy cases but the rescheduled sales do not take place unless and until relief from stay is granted. In Workingmen's Savings and Loan Association of Dellword Corp. v. Kestner, 652 A.2d 327 (Pa.Super. 1994 the mortgagors challenged the validity of a postpetition sheriff's sale. The mortgagors contended, as Debtor does here, that the continuation of the sheriff's sale by public announcement to a date certain in accordance with Pa.R.Civ.P. 3129.3(b) violated the automatic stay. The court rejected the argument stating:

> Under the prevailing view, postponing a foreclosure sale is not violative of the automatic stay provisions Postponement notices which specify a new sale date merely preserve the status quo between creditor and debtor We agree that this is a correct view Such a view is entirely consistent with the protection intended by the automatic stay

652 A.2d at 328~29.[10] The court cited Zeoli v. RU-IT Mortgage

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[10]Even if postponement of the sheriff's sale violated the stay, the bankruptcy court has "wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from the stay", In re Siciliano, 13 F.3d 748, 751 (3d Cir. 1994), quoting In re Schwartz. 954 F.2d 569, 572 (9th Cir. 1992) , even though the general rule is that actions taken in violation of the stay are void.

In Siciliano, a foreclosure sale was held three days post-petition. Neither the mortgagee nor the sheriff had notice of the filing of the bankruptcy and the Court of Appeals mortgagee's subsequent motion for relief from stay as void, not voidable. The court held that annulment of the stay "validated (the sale] as an exception to the void *ab initio* rule". 13 F.3d at 751. In the matter before us the only act complained of that allegedly violated the stay was the oral announcement at the previously scheduled sheriff's sale of a postponed date. By the time of the actual sheriff's sale, relief from stay had been granted. Annulment of the stay is to be determined on a case—by—case basis. In re Franck, 171 B.R. 893, 894 (Bankr. D. Idaho 1994) Under the circumstances of the matter before us, the order granting relief from stay operated as an annulment because it permitted the foreclosure to proceed. See also Constitution Bank v. Tubbs, 68 F.3d 685, 692 & n.6 (3d Cir. 1995) wherein the Court of Appeals for the Third Circuit stated:

148 B.R. 698 (D.N.H. 1993 as indicative of the prevailing view. In Zeoli the debtors filed a motion to hold the mortgagee in contempt for violating the automatic stay by postponing a foreclosure sale postpetition. The bankruptcy court granted the motion. The district court reversed. The court granted the motion The district court reversed. The mortgagee had appeared at the scheduled sheriff's

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> "Once a stay is in effect 'the parties themselves (can—]not validly undertake any judicial action material to the . . . claim against' the debtor . . . . This includes the filing of motions, which are void *ab initio,* unless the bankruptcy court later grants retroactive relief.[6]
>
> > Generally, judicial actions and proceedings against the debtor are void *ab initio* absent relief from stay We have, however, recognized that section 362(d), which . . . permits such relief to be applied retroactively, would allow the bankruptcy court to grant annulment of a stay, thereby making acts in violation of the stay voidable, rather than void *ab initio.* ~ In re Siciliano, 13 F.3d 748, 750—51 (3d Cir. 1994).

See also In re Molson, ___ F.3d __ 1997 WL 133320 (6th Cir.) (March 21, 1997) (after several bankruptcy filings and dismissals, bank foreclosed while automatic stay was in effect bankruptcy court eventually reopened bankruptcy case and annulled stay retroactively and its ruling was affirmed)

sale and postponed it to a date certain as required by New Hampshire law. Subsequently, the bankruptcy court granted relief from stay to the mortgagee. The court examined the legislative history of §362 and noted that its purpose was to prevent creditors from "'dismember[ing] estates by the foreclosures of liens Land] lamented the courts' inability, at that time, to halt continuation of foreclosure proceedings 148 B.R. at 699 citing H.R.Rep. No. 137, 93rd Cong., 1st Sess 16 1973) . While acknowledging that the bankruptcy court's interpretation of §362 with respect to the postponement of the sheriff's sale had merit, the court noted that

> The primary purposes of the automatic stay provisions are to effectively stop all creditor collection efforts, stop all harassment of a debtor seeking relief, and to maintain the status quo between the debtor and her creditors, thereby affording the parties and the court an opportunity to appropriately resolve competing economic interests in an orderly and effective way. *Maintaining the status quo is a repeating theme in decisions construing the automatic stay provisions.*

148 B.R. at 700 (citations omitted) (emphasis added). The court found that the only effect of postponement of a sheriff's sale is to maintain the status quo. In In re Roach, 660 F.2d 1316 (9th Cir.

1981), the Court of Appeals for the Ninth Circuit held that publication by a mortgagee of several successive notices of postponement of sale after the debtor filed a chapter 11 "maintained the status quo and did not harass interfere or gain any advantage This is consistent with purpose of the automatic stay provision." 660 F.2d at 1319 (citing In re Decker, 465 F.2d 294, 297 3d Cir. 1972)).[11] Roach was reaffirmed and applied to repetitious postponements of the foreclosure sale without obtaining relief from stay despite confirmation of a chapter 13 plan that provided for full cure of arrearages In re Peters, 101 F.3d 618 9th Cir 1996). In Peters, the court decided that confirmation of the plan was not a cure of the default and, until the actual payment of arrears, the debtor was still in default and the creditor was entitled to maintain the status quo.[12]

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[11] While Decker addressed the issue of whether, under the Bankruptcy Act of 1898, the bankruptcy court could summarily decide the question of ownership of real estate subject to state foreclosure proceedings, the court noted that the stay is "in the nature of [a] temporary injunctiont] designed to maintain the status quo". 465 F.2d at 297.

[12] In Constitution Bank v. Tubbs, 68 F.3d 685 (3d Cir. 1995), the court noted that the purpose of the automatic stay is to protect the debtor from, *inter alia*, initiating or prosecuting foreclosure actions. 68 F.3d at 691. However, the postponement and rescheduling of a sheriff's sale in accordance with state rules

Debtor also takes issue with the fact that the order granting relief from stay was entered only six days before the sheriff's sale took place and that the sheriff's sale was renoticed. He contends that 30 days' renotice was required under the Pennsylvania Rules of Civil Procedure and was not given Brief in Opposition to Motion to Dismiss at 7-8 This is incorrect as a matter of law. Rule 3129.2(c (3) of the Pennsylvania Rules of Civil Procedure provides that:

> If service on any person is not made at least thirty days prior to the date of the sale stated in the notice,[13] such notice shall be deemed timely if the sale is stayed, continued, postponed or adjourned in accordance with Rule 3129.3 to a date certain which is at least thirty days after the date of the last required service.

Timely service was made in accordance with the May 31, 1995, and August 31, 1990, orders.

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of civil procedure for the purpose of obtaining relief from stay without more is not "initiating or prosecuting" an action, but is merely maintaining its posture until the bankruptcy court can rule on a motion for relief from stay.

[13]The notice referred to is that required in Rule 3129.2(a) which provides that notice of a sale "shall be given by handbills by written notice . . . , and by publication . . ."

Rule 3129.3 provides that new notice under Rule 3129.2 is required unless

> the sale is stayed, continued, postponed or adjourned to a date certain within one hundred days of the scheduled sale, and public announcement thereof, including the new date, is made to the bidders assembled at the time and place originally fixed for the sale

In the instant case, no new notice was required because the sheriff's sale was continued at the September 5, 1995 scheduled date to a date that was more than 30 days after the last required notice and within 100 days of the scheduled sale Public announcement of the postponement, including the new date, was announced to those present In the matter before us the Pennsylvania Rules were adhered to. Additional service was not required. The oral continuation was proper under state law. The fact that Debtor chose not to attend the sale on its initial date, September 5, 1995, and thus did not hear the announcement is of n6 consequence. The postponement is to assure notice to bidders at the sale of the time and place of the new sale. Debtor's election not to appear was his choice and does not rise to the level of a creditor's violation of debtor's right to due process.

Debtor also challenges the May 31, 1995, order of the Court of Common Pleas of Westmoreland County permitting substitute service by reconfirming *nunc pro tunc* the prior order of August 31, 1990,[14] allowing substitute service.[15] Once again, we find Debtor's argument to be without merit. Rule 3129.3(a) provides that "[e]xcept as provided by subdivision (b) or special order of court, new notice shall be given as provided by Rule 3129.2 if a sale of real property is stayed, continued, postponed or adjourned."

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[14]Debtor's brief states the date of the prior order as April 31, 1990. We think this is a typographical error. The docket attached to his complaint and that attached to Slick's motion to dismiss show the August date. Moreover, April has only 30 days;

[15]In his complaint Debtor notes the fact that Slick obtained the May 31, 1995, order without having sought reissuance of the Writ of Execution. The Westmoreland County Court of Common Pleas docket shows that a Praecipe to Reissue the Writ of Execution was filed on August 22, 1994. The writ was reissued and served. The sale was advertised and Debtor filed the initial bankruptcy case in February of 1995, staying the execution. That bankruptcy was dismissed, also in February of 1995. The order of May 31, 1995, predated the Praecipe to Reissue the Writ filed on June 7, 1995. However, Rule 3106(b) provides that "(a] writ may be reissued at any time, and any number of times, by endorsement thereon by the prothonotary of the word 'reissued'". Rule 3121(f) provides that "[a]fter the termination of a stay, sale may be had without reissuance of the writ." See also Pa.R.Civ.P. 3183(f) [a]fter the termination of a stay, execution may proceed without reissuance of the writ") Thus, Slick was not required to have the writ reissued, even though he did so.

(Emphasis added In the matter before us, the order of August 31, 1990, which was reconfirmed by the May 31, 1995, order, constituted the "special order of court" referred to in Rule 3129.3(a). Westmoreland County Civil System Case History Listing entry dated June 1, 1995, Complaint Exhibit C. The Explanatory Comment to the Rule states that the provision concerning special orders "gives the court discretion to allow postponement of the sale without new notice in appropriate cases." In the matter before us the sale had been rescheduled several times since the original 1990 date, in accordance with the Pennsylvania Rules of Civil Procedure.[16] Furthermore, Debtor admits that he received notice of the sheriff's sale scheduled for September 5, 1995. Rule 3129.2(c) (1 (C) provides, in pertinent part

> if service cannot be made as provided in subparagraph (A) (handbills, written, publication] or (B) [posting] the notice shall be served pursuant to special order of court as prescribed by Rule 430, *except that if original process* was *served pursuant* to *a special order* of *court* under Rule 430

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[16]Pa.R.Civ.P. 3183 provides that "(a) Execution shall be stayed . . . (1) upon written direction of the plaintiff to the sheriff . . . (f) After the termination of a stay, execution may proceed without reissuance of the writ." In the matter before us Slick filed Praecipes for reissuance of the Writ and amended affidavits under Pa.R.Civ.P. 3129.1 in 1993 and 1994.

> upon the defendant in the judgment, the *notice may be served upon that defendant in the manner provided by the order for service of original process without further application to the court.*

Pa.R.Civ.P 3129.2(c)(1)(C) (emphasis added) Thus, the notice pursuant to the May 31, 1995, order relative to the September 5, 1995, sale was sufficient and Debtor's implication that the notice was somehow defective because the order was issued before Slick applied for reissuance of the writ is without merit See Pa.R.Civ.P 3121(f), 3183(f) and n.15, supra.

We find that postponement of the sheriff's sale to a date certain did not violate the stay under the circumstances of this case and that the sale comported with the Pennsylvania Rules of Civil Procedure. Count I of the complaint will be dismissed and judgment will be entered in favor of Slick.[17]

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[17]The motion avers that the issues Debtor raises concerning foreclosure and the sheriff's sale were or could have been litigated in the state court proceeding. The state court docket reflects that the foreclosure judgment was entered by default, not after a trial on the merits. Nonetheless, the judgment was entered six and one-half years ago and was never challenged in the state courts. Thus, any challenge now is time barred. Moreover, Debtor does not mount a challenge now. He simply contends that the sheriff's sale was void because it was continued to a date that was postpetition. We have rejected this argument.

Count VI concerning equitable recoupment also will be dismissed inasmuch as Debtor does not state a claim upon which relief he seeks can be granted He merely alleges that Slick's livestock destroyed his crops and that Slick failed to "adjust[] his current alleged claim to account for the damages caused by his livestock." Complaint at ¶ 53. Debtor does not allege an amount of damages or a time period in which the events occurred, but simply requests recoupment. However, Slick has not filed a claim in this case. Thus, no recoupment can be granted.

As stated earlier in this Memorandum Opinion, the allegations concerning wheat and straw in the remaining counts cannot be disposed of on the Motion to Dismiss. Therefore, an answer will be required

An appropriate order will be entered.

Judith K. Fitzgerald
United States Bankruptcy Judge

DATED: May 1, 1997

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United States Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: Harvey Taylor, Debtor	(Bankruptcy No. (95-23393 JKF (
Harvey Taylor, Plaintiff v.	(Chapter 11 ((Adversary No. (96-2584
Thomas McCune Slick, individually and as Executor of the Estate of Dorothy M. Balentine, Deceased, Defendant	((((((

ORDER

AND NOW, that **1st** day of **May, 1997**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED and DECREED** that Defendant's Motion to Dismiss is **GRANTED IN PART** and Count I and Count VI of Debtor's Complaint are **DISMISSED WITH PREJUDICE**.

It is **FURTHER ORDERED** that Counts IV and V are **DISMISSED WITH PREJUDICE** insofar as they concern the property at issue in Count I. Counts II, III, IV and V remain active with respect to the wheat and straw.

It is **FURTHER ORDERED**, that Defendant shall file an answer to Counts II, III, IV, and V of the Complaint excluding those matters herein dismissed, on or before **May 21, 1997**.

It is **FURTHER ORDERED** that a pretrial and conciliation conference on issues concerning the wheat and straw as stated in Counts II through V is scheduled on **June 6, 1997**, at 10:00 **a.m.** in Courtroom 1112 of the Wm. S. Moorhead Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania.

Judith K. Fitzgerald
United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	
Harvey Taylor,	(Bankruptcy No.
Debtor	(95-23393 JKF
	(
Harvey Taylor,	(Chapter 11
Plaintiff	(
v.	(Adversary No.
	(96-2584
Thomas McCune Slick,	(
individually and as	(
Executor of the Estate	(
of Dorothy M. Balentine,	(
Deceased,	(
Defendant	(

JUDGMENT ORDER

And Now, to-wit, this **21st** day of **August, 1997,** for the reasons expressed on the record this date, **It is hereby Ordered** that

(1) Judgment is entered in favor of Defendant and against Plaintiff on Counts II, III, IV and V, for the reason that at the time the wheat and straw were harvested, the parties have stipulated that Defendant was the record title holder of the property. The parties stipulate and the Court finds that the owner of the land is entitled to harvest and keep the proceeds of wheat and straw. Thus, to the

extent that Defendant's ownership of the property is confirmed on appeal, Plaintiff has no claim to the proceeds of the wheat and straw. However, in the event that Defendant's ownership of the property should be set aside on appeal, the parties have stipulated and the Court finds that this Judgment should be vacated and a hearing held to determine the amount of set off or recoupment to which Plaintiff would then be entitled, which offset would be applied against the balance Plaintiff would then owe to Defendant on the mortgage.

(2) Judgment is entered in favor of Defendant and against Plaintiff on Counts I and VI for the reasons expressed in this Court's Memorandum Opinion and Order dated May 1, 1997. Plaintiff acknowledges that the activities complained of in Count VI are beyond the statute of limitations

(3) The Court retains jurisdiction over this adversary, or not the Chapter 11 proceeding itself is dismissed, final judgment or order herein.

(4) The Clerk shall close this adversary.

Judith K. Fitzgerald
United States Bankruptcy Judge

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U.S. Const. Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11 U.S.C. Section 362(a)

(a) Except as provided in subsection (b) of this section, a petition filed under **Section 301, 302,** or **303** of this title, or an application filed under **section 5(a)(3)** of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial,

administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien

to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.